No. 16,188

United States Court of Appeals

For the Ninth Circuit

VALLE LAWRENCE PROST,
Appellant,

vs.

MORRISON-KNUDSEN LIMITED,
Appellee.

Appeal from the United States District Court,
Northern District of California,
Southern Division.

OPENING BRIEF FOR APPELLANT.

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STATEMENT OF JURISDICTION.

The complaint was filed on March 11, 1958 by a resident of the State of California against an Australian corporation, allegedly a wholly-owned subsidiary of Morrison-Knudsen Company, a Delaware corporation (R. 3, 4). The proceedings were thus instituted under 28 U.S.C.A. § 1332 which then provided as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $3,000 exclusive of interest and costs, and is between:

(1) citizens of different States;

(2) citizens of a State, and foreign states or citizens or subjects thereof;

(3) citizens of different States in which foreign states or citizens thereof are additional parties.

(b) The word 'States' as used in this section, includes the Territories and the District of Columbia, and the Commonwealth of Puerto Rico."

After the filing of the complaint the defendant moved to dismiss the causes of action specified in the complaint and for summary judgment as to the third cause of action. The District Court entered an order and final judgment in favor of defendant. From that judgment appellant has taken this appeal. The jurisdiction of this Court to review the final judgment below is sustained by 28 U.S.C.A. § 1291.

STATEMENT OF THE CASE.

This action involves the disputed breach of an overseas contract of employment. The plaintiff-appellant filed a complaint alleging three causes of action over the contract of employment involved which is attached to the complaint (R. 7-20). The first claim for relief is an account stated to obtain the benefits withheld from him by the appellee under the terms of paragraphs 4, 6 and 7 of said contract. The second claim for relief is for breach of a written contract involving both the claimed benefits set forth in the first claim for relief and for damages flowing from the breach of the con-

tract. This was estimated on the basis of loss of salary for the period from the breach to the end of the alleged two-year contract. The third claim for relief is for the breach of an oral contract of employment between the parties. It alleges the same damages as claimed in the breach of the written contract in the second claim for relief.

The defendant below filed motions to dismiss the complaint, for summary judgment and to strike (R. 23-30). As to all three claims for relief, the defendants moved that the claims did not state a cause of action; that the plaintiff had not alleged the performance of Section 14 of the written contract, and that the claims were outside the jurisdiction of the federal courts as not involving a controversy of more than $3,000.00. The appellee urged that the sum of $8,670.00 could not support the court's jurisdiction since the contract was at will. The defendant below separately moved for summary judgment as to the third claim for relief on the ground that the written contract of employment governed the parties.

Argument was then had and the court below sustained the motions to dismiss on June 19, 1958 (R. 30). Thereafter an order of dismissal and judgment was entered dismissing the complaint on the ground that the federal court did not have jurisdiction of the controversy (R. 31). Plaintiff then duly appealed. Thus the issues raised by the ruling of the learned court below are: (1) Did the federal court have jurisdiction under 28 U.S.C.A. § 1332 upon the filing of a bona fide complaint for breach of contract which in-

volved the interpretation of said contract? (2) Even if the contract were interpreted against plaintiff-appellant at pretrial procedure, would such a ruling prevent plaintiff-appellant a trial before a federal jury?

The first claim for relief admittedly involved a sum which the appellee apparently does not contest would be paid if the trier of fact should determine that it wrongfully breached the contract attached to the complaint. The second claim for relief involves a dispute as to whether the plaintiff was employed for a period of two years. The third claim for relief involves a dispute as to the legality of the written contract and asserts that an oral contract existed between the parties regardless of the written contract which if breached would cause the defendant to be liable to the plaintiff in a sum exceeding $3,000.00.

The plaintiff-appellant thus contends that the court below had jurisdiction of the controversy and the defendant-appellee contends that it did not.

SPECIFICATION OF ERRORS.

1. The District Court erred in dismissing the plaintiff's complaint on the ground that it lacked jurisdiction over the controversy.

ARGUMENT.

I. THE FEDERAL COURTS HAVE JURISDICTION OVER PLAINTIFF'S COMPLAINT SINCE IT INVOLVES A GOOD FAITH CLAIM FOR AN AMOUNT IN EXCESS OF $3,000.

A. Whether or not the plaintiff is entitled to damages in excess of $3,000 involves a mixed question of law and fact as to the interpretation of the contract and the intention of the parties.

1. The District Court had jurisdiction to hear and determine plaintiff's allegations and its pretrial determinations did not oust the federal court of jurisdiction.

There can be little doubt that that record below showed the filing of a bona fide claim in good faith by plaintiff asserting a claim for over $3,000.00. The parties are in a bona fide dispute over the terms of an employment contract, and the construction of it involves a matter of over $3,000.00. First, it is admitted by the appellee that under paragraph 4 of the contract, it would be liable to at least the sum of $2,470.00 if the contract was wrongfully breached. Second, the contract calls for the employment of plaintiff for two years at a monthly rate of $900.00 (R. 7). Third, that the plaintiff, if correct in his contentions, would be entitled to approximately $8,670.00 as the prima facie measure of damages lost by the breach of contract alleged.

The contract cannot be said, in a jurisdictional argument, to permit the defendant to assert that the plaintiff is not in good faith in asserting a claim for damages in excess of $3,000.00.

1. The contract states in its wherefore clause that the defendant is engaged in a construction job for the Government of Iraq and desires to retain the services of plaintiff for work in connection with said construction (R. 8).

2. Paragraph 1 of said contract specifically refers to said construction project with the Government of Iraq and says that the contract is subject to it (R. 9).

3. Paragraph 4 (R. 10) of the said contract is the major provision in dispute. Appellee asserts that this provision makes the contract a contract terminable at the will of the defendant and limits its liability. Appellant asserts that this provision calls for his services for twenty-four months and that the defendant has the election to terminate the contract prior to said time only if it advances the monetary benefits of the contract with said election. That, further, if the defendant refuses to advance said benefits, the rights and duties of the parties are governed by Paragraph 11 of the contract (R. 17). As such, the defendant must prove "good cause" and that if the plaintiff proves lack of good cause and breach that the damages flowing from such lack of good cause can easily exceed $3,000.00.

It is respectfully asserted that for jurisdictional purposes this contract clearly involves a dispute over a twenty-four-month contract involving salary of $900.00 a month. Paragraph 4 clearly provides for a twenty-four-month period in its very terms. And the twenty-four-month period is set forth in Paragraphs 10 and 11.

So it is that the plaintiff's complaint cannot be dismissed on jurisdictional grounds.

The rule is stated in *St. Paul Mercury Indemnity Co. v. Red Cab Co.,* 1938, 303 U.S. 283, 288-290, 58 S.Ct. 586, 590:

"The intent of Congress drastically to restrict federal jurisdiction in controversies between citizens of different states has always been rigorously enforced by the courts. The rule governing dismissal for want of jurisdiction in cases brought in the federal court is that, unless the law gives a different rule, the sum claimed by the plaintiff controls, if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim. But if, from the face of the pleadings, it is apparent, to a legal certainty, that the plaintiff cannot recover the amount claimed or if, from the proofs, the court is satisfied to a like certainty that the plaintiff never was entitled to recover that amount, and that his claim was therefore colorable for the purpose of conferring jurisdiction, the suit will be dismissed. Events occurring subsequent to the institution of suit which reduce the amount recoverable below the statutory limit do not oust jurisdiction."

In *Lilienthal v. M'Cormick,* 9th Cir., 1902, 117 Fed. 89, this court has held that the jurisdiction of the federal courts did not depend on the construction given by the courts on a contract when the complaint alleged in good faith damages in excess of the then jurisdictional amount of $2,000.00.

In this case the complainants had sued for the recovery of $3,451.00 under a contract for the sale of hops. The complainants had advanced the sum of

$1,051.00 on the contract but contended that they had a lien on the entire crop of hops. The lower court held that the complainants had a lien interest only to the extent of their advances. On appeal, testing the jurisdiction of the federal courts, this court stated, 117 Fed. 95:

> "The amount in controversy exceeded $2,000, exclusive of interest and costs, and this amount was sufficient to give the court jurisdiction over the cause. The suit was brought, not only to recover the amount of money advanced by complainants, viz., $1,051, but also for damages in the sum of $2,400, making a total of $3,451. It makes no difference, in so far as the question of jurisdiction is concerned, that the court in its decree held that the contract only afforded a security for the amount advanced, and could not be construed as giving a lien for the damages. It is the amount claimed in the bill of complaint, and not the amount recovered, that furnishes the test of jurisdiction. As was said by the court in Peeler v. Lathrop, 1 C.C.A. 93, 99, 48 Fed. 780, 786: 'The amount in dispute, or matter in controversy, which determined the jurisdiction of the circuit courts in suits for the recovery of money only, is the amount demanded by plaintiff in good faith.' "

See, also:

Schunk v. Moline, Milburn & Stoddard Co., 1893, 147 U.S. 500, 13 S.Ct. 416;

Erickson v. Allstate Insurance Company, S.D. Cal., 1954, 126 F. Supp. 100, affirmed 227 F. 2d 755;

Prejean v. Delaware-Louisiana Fur Trapping Co., 5th Cir., 1926, 13 F. 2d 71.

II. THE REASONABLE CONSTRUCTION OF THE CONTRACT OF EMPLOYMENT IS THAT THE DURATION OF THE CONTRACT IS FOR A TERM OF TWO YEARS OR UNTIL THE COMPLETION OF THE CONSTRUCTION JOB SUBJECT TO TERMINATION PRIOR TO SAID TIME BY THE EMPLOYER IF HE PAYS THE EMPLOYEE HIS TERMINATION BENEFITS OF IF HE ELECTS TO DEFEND ON THE GROUND THAT (a) THE EMPLOYEE QUIT OR (b) THAT THE EMPLOYEE WAS FIRED FOR CAUSE.

A. A contract requiring a citizen to travel thousands of miles to do work on a particular construction project for twenty-four months, which is written by the employer, which contains alternative provisions and which indicates to the reasonable man a two year period of employment is to be interpreted under all of its terms and meanings and not by one single phrase.

1. The defendant only had an election of remedies to cancel at will with the payment of contract benefits or to defend a breach of contract action.

The defendant asserts that the phrase in Paragraph 4 of the contract of employment (R. 10) that:

> "The term of the Employment Contract shall be the period during which the Contractor desires the services of the Employee in connection with construction or other work in Iraq; . . ."

governs both the jurisdictional argument and arguments on the merits that its liability is limited to less than $3,000.00 as a matter of law. Plaintiff asserts that this single sentence is directly tied to (a) the construction job with the Government of Iraq or (b) the twenty-four-month period. This phrase is expressly qualified by the fact that the employee must work for 24 months; that if in the opinion of the contractor the services of the employee are no longer required, the contract, *at the option of the contractor,* shall terminate, and what is exceedingly significant, further provides that in the event the contractor's

construction contract is completed or terminated before the expiration of *said period* (R. 10) the employment contract shall terminate and the contractor shall only be obligated to pay the employee for services rendered to the date of such termination or completion and salary during the return trip to the United States as provided in Section 6 and return travel expense as provided in Section 7(a). "Said period" obviously refers to the construction project completion or twenty-four months.

Elementary rules of contract construction, it is respectfully asserted, clearly militate against any other construction than that the contract of employment is for a term of twenty-four months subject to an optional termination on condition that (1) the construction project with the Government of Iraq was completed or (2) the contractor pays the employee the termination benefits of the contract.

1. In the interpretation of a written contract it is fundamental that the instrument must be examined as a whole.

12 Cal. Jur. 2d 331-333.

As such, Paragraph 4 must be construed as a whole and must be construed with Paragraphs 1, 10 and 11, which all indicate that the parties were looking for a two-year period of employment or until the construction project was completed.

2. The language of a contract is to be construed against the maker of the contract, in this instance, the employer.

Civ. Code Cal. § 1654;

RKO v. Sheridan, 195 F. 2d 167;

Crillo v. Curtola, 91 C.A. 2d 263;
Pacific Lumber Co. v. I.A.C., 22 C. 2d 410.

3. A construction that would make an agreement reasonable, fair and just is preferred to one that, though equally consistent with the language, would make the contract unreasonable and unfair.

12 Cal. Jur. 2d 341;
Civ. Code Cal. § 1643.

It would appear especially determinative that the parties here knew that there was a vast construction job to be done in Iraq, that this job was to take probably two years to complete, and that the plaintiff here undertook to travel to Iraq under what clearly appeared to be a two-year contract. The employment contract here by special reference to the construction project, by its constant reiteration of the twenty-four-month period and by the alternative provision of Paragraph 11, is manifestly subject to the reasonable construction that both parties contemplated that this contract was to last for two years or until the construction project was terminated.

A similar contract is noted in *Olsen v. Arabian American Oil Co.,* 2nd Cir., 1952, 194 F. 2d 477. This case held that an overseas employer could terminate its contract without further liability by the payment of the stipulated benefits, "for the company was required to pay an additional consideration for the exercise of that option" (id., at 479).

Here, of course, the complaint clearly disclosed that the employer refused to pay the additional consideration necessary for the exercise of the option of ter-

mination. That case also cites us to *Carter v. Bradlee,* 1935, 280 N.Y.S. 368. Here the court stated at 280 N.Y.S. 370:

> "This contract, however, contained the following provision: 'This Agreement is made for two years from November 1st, 1925, but it is understood and agreed that we retain the right to terminate this Agreement and to discharge you at any time, should we feel called upon to do so for any reason.'
>
> It is contended by the defendants that the trial court properly decided that under the foregoing provisions the plaintiff could be discharged at any time. We adopt a different view. Such a construction would make the contract merely one at the defendants' will, though by its terms it was for two years. A construction will not be given to a contract, if possible, that would place one of the parties at the mercy of the other. Simon v. Etgen, et al., 213 N.Y. 589, 107 N.E. 1066. Under the clause in question, we are of the opinion that any discharge before the expiration of a year should have some 'reasonable' ground and that the reason must be attended with good faith. (Citing New York cases.)"

It is respectfully asserted therefore that the necessary corollary to the *Olsen* case is that the contract here is subject to the reasonable interpretation that the appellee has written a contract containing alternative provisions. It promised the plaintiff employment for twenty-four months. It could terminate this contract upon the payment of the benefits of the contract. If it chooses not to pay the benefits, it has

elected to operate under the provisions of Paragraph 11, and upon the proof that the contract was not terminated "for cause" under its provisions, it is liable for all damages flowing from the breach of a twenty-four-month employment contract. It cannot now elect to treat this contract as terminable at will without having fulfilled its own promises. In *Nattini v. Dewey,* 96 C.A. 2d 545, 548-549, the court stated:

> "The contract provided that 'the term hereof *may* be sooner terminated (upon two weeks notice to Nattinis) in the event continued operation of the club is found to be impractical.' That language granted appellants an election to terminate. It did not mean that termination would automatically result from the occurrence of the anticipated condition. The language clearly implied that notice was the *sine qua non* to the termination of the employment. Since the termination was dependent upon the choice of appellants, their privilege not having been exercised in the prescribed manner, there was no intention, choice or preference indicated in order to effect such termination and there was none."

4. California precludes the summary dismissal of an action involving the construction of a contract which is susceptible of alternative interpretations. In *Walsh v. Walsh,* 18 Cal. 2d 439, the Supreme Court of California reversed a summary judgment ruling in favor of the defendant after the lower court had held that the construction of the contract was subject to summary judgment. The Supreme Court stated at 443:

"When a contract is in any of its terms or provisions ambiguous or uncertain, 'it is primarily the duty of the trial court to construe it *after a full opportunity afforded all the parties in the case to produce evidence of the facts, circumstances and conditions surrounding its execution and the conduct of the parties relative thereto.*' (Barlow v. Frink, 171 Cal. 165, 172, [152 Pac. 290].)" (Italics added.)

And at 444:

"When the meaning of the language of a contract is uncertain or doubtful and parol evidence is introduced in aid of its interpretation, *the question of its meaning is one of fact . . .*" (quoting *Scott v. Sun Maid Raisin Growers Assn.*, 13 C.A. 2d 353).

B. The appellee cannot stand on a repudiated promise in limiting its damages.

1. An unexercised option to terminate cannot limit damages under a jurisdictional argument or upon the merits.

The measure of damages for wrongful discharge of an employment contract is the unpaid remainder of the amount of salary agreed on for the entire period of service, less the amount the employee has earned or with reasonable effort might have earned in other employment. The contract price furnishes the prima facie measure of recovery, and the burden is on the employer to show that the actual loss was less. 32 Cal. Jur. 2d 483. Manifestly, the breach of the contract involved herein would make the appellee prima facie liable for the loss of benefits deprived the appellant

by the wrongful discharge prior to the completion of the construction project with the Government of Iraq or prior to the twenty-four-month period.

It would appear completely contrary to justice to permit the appellee here to urge that damages are limited by the provisions of Paragraph 4, to the withheld benefits, when it has elected not to terminate the contract under this provision. Appellee has withheld benefits to the appellant and has sought to treat this action as though it had in fact paid said benefits. But as set forth in *Prudential Insurance Co. v. Faulkner,* 10th Cir., 1934, 68 F. 2d 676, 679:

> "One who repudiates his obligation under a contract cannot thereafter exercise an election contained in its provisions. Having assumed and still maintaining that attitude, the company waived its right to elect between the alternative methods of payment and thereupon became liable for the full amount in one sum."

See, also:

Nattini v. Dewey, supra.

In *Ramsey v. Rodgers,* 60 C.A. 781, the court held that the invalidity of clause calling for the payment of liquidated damages, assumed to be void, did not prevent the employee from gaining all damages suffered upon breach of the contract by the employer. Thus the stipulated contract benefit to be paid upon the exercise of an option to cancel did not determine the amount of damages which could be recovered upon the breach of the contract.

The record thus discloses that the plaintiff filed a bona fide complaint for the breach of a contract of employment involving a controversy in excess of three thousand dollars. The appellee has sought to oust the jurisdiction of the federal courts by claiming that the contract was for an at will term and that the appellant could not recover damages in excess of his benefits which would have been paid had appellee elected to treat the contract as terminated.

But clearly the law does not allow a party to claim the advantages of a repudiated promise. Appellant is therefore entitled to a trial to determine whether or not the appellee breached the contract of employment with him. At such a trial the appellee cannot claim the benefits of Paragraph 4 which it has disavowed. And even if the court below was correct in interpreting appellant's action as limited by Paragraph 4, such a decision did not oust the federal court of jurisdiction. The appellant in good faith has claimed damages in excess of eleven thousand dollars, and the court had exercised federal jurisdiction in making a determination as to the construction of the contract in bona fide dispute.

CONCLUSION.

It is respectfully prayed that a judgment be rendered reversing the judgment below.

Dated, San Francisco, California,
January 5, 1959.

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Attorney for Appellant.